

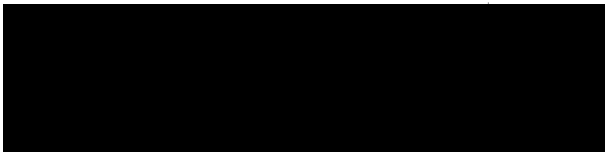


U.S. Citizenship
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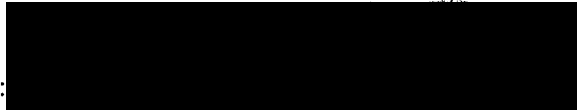
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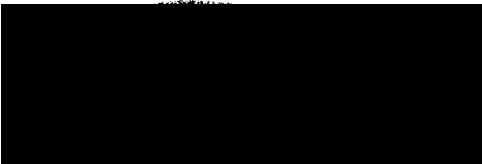
Petitioner:

Beneficiary:



PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The decision of the director will be withdrawn and the petition will be remanded for further action and consideration.

The petitioner is an Internet provider of tickets. It seeks to employ the beneficiary permanently in the United States as a software engineer pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, the petition was accompanied by certification from the Department of Labor. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence. For the reasons discussed below, we find that this new evidence overcomes the director's valid concerns for 2003, the only year for which the director expressed concern. Thus, we will remand the matter to the director to determine whether the petitioner is able to demonstrate a continuing ability to pay the proffered wage in 2004.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on December 4, 2003. The proffered wage as stated on the Form ETA 750 is \$79,772 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner as of October 2000.

On the petition, the petitioner claimed to have an establishment date in 2000, a gross annual income of \$21,624,991, a net income of (\$776,425) and 17 employees. In support of the petition, the petitioner submitted the petitioner's 2002 tax return.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on May 9, 2005, the director issued a notice of intent to deny the petition, requesting evidence of the petitioner's ability to pay the proffered wage. Specifically, the director requested the petitioner's tax returns for 2003 and 2004 and any Forms W-2 issued to the beneficiary by the petitioner.

In response, the petitioner submitted its 2003 Form 1120 Corporate tax return and reviewed financial statements for 2003 and 2004. The documents reflect the following information for the following years:

	2003 (tax return)	2003 (reviewed statement)	2004
Net income	(\$1,146,380)	(\$1,159,079)	\$497,926
Current Assets	\$1,141,535	\$1,131,533	\$2,087,315
<u>Current Liabilities</u>	\$1,239,579	\$1,211,480	\$770,122
Net current assets	(\$98,044)	(\$79,947)	\$1,317,193

In addition, the petitioner submitted copies of the Forms W-2, Wage and Tax Statements the petitioner issued to the beneficiary in 2003 and 2004. The Forms W-2 reflect wages of only \$65,000 in 2003 and \$67,000 in 2004, \$14,772 and \$12,772 less than the proffered wage respectively.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on June 10, 2005, denied the petition.

On appeal, the petitioner submits bank statements for two of the petitioner's accounts for December 2003. The balances for these accounts are \$9,984.86 and \$555,867.52. The petitioner also submitted an affidavit from the petitioner's Chief Financial Officer asserting that Deferred Revenue and Deferred Rent are not "true liabilities that will require a future outlay of cash."

Normally, reliance on the balances in the petitioner's bank accounts is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, evidence would need to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets. As will be discussed below, however, the use of bank statements to cover the 27 days in 2003 after the December 2003 priority date is persuasive in this particular case.

Where the petitioner has submitted the requisite initial documentation required in the regulation at 8 C.F.R. § 204.5(g)(2), Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid the beneficiary during the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 2003 or 2004. Specifically, the petitioner paid the beneficiary wages \$14,772 and \$12,772 short of the full proffered wage.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing

that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. We reject, however, any argument that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.¹ A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets.

Counsel requests that CIS prorate the proffered wage for the portion of the year that occurred after the priority date. We will not, however, consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage.

Nevertheless, we find that prorating is appropriate *in this case*. The priority date is less than one month before the end of 2003. Thus, if the petitioner were to establish its ability to pay the proffered wage in 2004 without relying on cash that might have been expended to pay the proffered wage in 2003, we would be willing to consider bank statements towards an ability to pay the proffered wage in just that month. As stated above, the petitioner has now submitted bank statements for December 2003. These statements reflect an ending balance of \$9,984.86 and \$555,867.52. The prorated proffered wage for that month less the prorated wages actually paid in that month is only \$1,231 (\$14,772 divided by 12). The funds in the petitioner's bank accounts in December 2003 are more than sufficient to cover the difference between wages paid and the proffered wage during that month. Thus, we do not have to reach the petitioner's assertions regarding deferred revenue, defined as money received from customers in advance of performance of revenue activities. This amount will be spent on goods or services, or will be repaid to the customer according to www.gcsaa.org/mc/benefits/glossary.asp. As deferred revenues are still at risk until the services are actually performed, applying those funds towards an ability to pay the proffered wage is tenuous at best.

¹ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

While the record contains evidence that the petitioner obtained an extension for filing its 2004 tax return, that return should now be available. The financial statements for 2004 are not audited; thus, they do not constitute the type of evidence required under 8 C.F.R. § 204.5(g)(2). Given the petitioner's precarious financial situation in 2003 such that we are only able to find an ability to pay by looking at December alone, it is reasonable to expect that at this point, the petitioner demonstrate its continuing ability to pay the proffered wage in 2004.

Therefore, this matter will be remanded for a new request for additional evidence requesting either the petitioner's 2004 tax return or audited financial statements for 2004. As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision, which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.